Supreme Court of the United States

October Term—1978

No. 77-1685

ANGELO ROCHE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

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-against-

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Angelo Roche petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, which affirmed a judgment of conviction of the United States District Court for the Southern District of New York.

OPINION BELOW

The opinions and rulings of the United States District Court for the Southern District of New York are unreported.

The Court of Appeals affirmed the judgment of conviction in a Per Curiam opinion on April 28, 1977 (see Appendix A).

JURISDICTION

The judgment of the Court of Appeals was dated and entered on April 28, 1978. Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the indictment charged a single conspiracy, while the proof showed a series of smaller ones, resulting in a material variance prejudicial to petitioner.

2. Whether the inherent unfairness of the mass indictment and resulting subjection of petitioner to "voluminous testimony relating to unconnected crimes in which he took no part" prejudiced petitioner.

3. Whether the prosecutor improperly vouched for the credibility of the Government's witnesses.

4. Whether the submission of a copy of the indictment to each juror to take into the jury room during deliberations prejudiced petitioner.

STATEMENT OF THE CASE

Petitioner was tried before Honorable Vincent L. Broderick and a jury and convicted of a violation of 21 U.S.C. §846 and 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A) (two counts). On September 23, 1977 he was sentenced to concurrent terms of imprisonment of fifteen years on each count and placed on Special Parole for a period of fifteen years to commence upon expiration of his confinement.

The indictment charged a single conspiracy covering the period from October 1, 1973 to November 6, 1975. It named twenty-four defendants and sixteen co-conspirators. The first count accused all of the defendants of conspiracy to violate the federal narcotics laws. It listed

forty-four overt acts in which each defendant is mentioned at least one time. Petitioner is the subject of acts five and twelve. Twenty-eight additional counts charged all but three of the defendants with substantive narcotics offenses (see Appendix B).

The trial lasted six weeks and consumed over 3700 pages of transcript. At its conclusion petitioner and the eight co-defendants jointly tried with him were convicted of all charges against them.

Through its witnesses and exhibits the Government showed that various people brought heroin from California to New York for distribution and sold it there. Additional testimony concerned the arrests and searches of some defendants and co-conspirators, undercover purchases of narcotics and the recovery of twenty kilos in California over one year after petitioner's last alleged purchase of drugs in New York.

Three witnesses mentioned petitioner and only one of them described any illegal activity. Out of the hundreds of meetings and transactions that took place over a two-year period, one of the distributors—Raymond Rivera-Rodriguez—testified that he sold petitioner one-half of a Kilogram of heroin four times between August and October, 1974. The testimony covered parts of fifteen pages. A Drug Enforcement Agent testified that he arrested petitioner in Puerto Rico on March 2, 1977 and recognized a car parked in front of the residence as similar to a car driven by co-defendant Jose Velasquez in late 1975 or early 1976. A search of the vehicle produced papers belonging to Velasquez. Another Drug Enforcement Agent testified that petitioner was present during a conversation concerning the purchase of heroin, although he did not speak or in any way partake therein, that the agent and Velasquez had in a bar on June 3, 1974.

Eight defense witnesses, including two co-defendants, testified. Only one defense witness and two exhibits con-

cerned petitioner. In order to explain the presence of a car outside his home in Puerto Rico and the presence of some papers in it referring to co-defendant Jose Velasquez, petitioner called Jaime Velasquez to the witness stand. To prove his presence in Puerto Rico on August 12, 1974, petitioner produced a bill of sale for a house he had purchased there on that date.

REASONS FOR ALLOWING THE WRIT

1. The Multiple Conspiracy Question.

The proof at trial revealed several independent and separate conspiracies, rather than the single conspiracy averred in the indictment. Where such a variance results in prejudice to the accused—the claim set forth herein by petitioner—a reversal of the conviction is mandated (*Kotteakos v. United States,* 328 U.S. 750 [1946]).

Viewing the evidence in the light most favorable to the Government, the first conspiracy began in December, 1973 when Benito Cruz financed Fernando Gallardo and ended when they split up in January, 1974. In March of that year Cruz again turned to Gallardo for his source of drugs and became part of his operation. This second conspiracy, too, was short-lived and ended by June, 1974, by which time Cruz' drug activities no longer involved Gallardo.

Chronologically, the third and first of two larger conspiracies commenced in August 1974 when Raymond Rivera-Rodriguez made his first trip to California for Fernando Gallardo. From that time until November, 1974 he traveled to California five times and brought back and distributed a total of eighty-five packs (nine-ounce packages of heroin). Petitioner was one of his purchasers. Rivera's partner and major assistant in disposing of the narcotics was Jose Luis Iglesias, who is otherwise unmentioned in the trial testimony.

Rivera's involvement with Fernando Gallardo continued during the spring of 1975. Domingo Zayas, Martha Machado, Carlos Gallardo and Pumarejo supplied him with sixty or seventy packs which he sold.

The fourth conspiracy, although short in duration, was major in scope and centered about the twelve-day distribution of seventeen kilos of heroin for $850,000 by Cruz. It cannot be seriously contended that Cruz replaced Rivera, for they had none of the same customers. Only Raymond Rossy both bought drugs from Cruz and had previously been a Gallardo, although not a Rivera, customer. Rossy, in turn, sold to people otherwise unconnected with Cruz or Rivera.

These four conspiracies are the chain conspiracy type. A fifth wheel conspiracy can be carved from the testimony of Rivera which shows him and Iglesias to be New York distributors and petitioner, as a customer, the end of one of the spokes on the wheel.

Much additional testimony elicited at trial involved the drug dealings of Cruz and Rossy outside the Gallardo organization. Also DEA agents testified about their involvement with the various defendants and co-conspirators. For example, Jose Guzman, Raphael Rivera and Juan Roman made five, three and seven undercover purchases of narcotics, respectively; numerous search warrants and arrests of the defendants and conspirators resulted in the seizure of large amounts of drugs and cash; and the arrest of the California connection in November, 1975 included a seizure of twenty kilos of heroin. Finally, Raymond Valentine testified about his drug purchases, including six transactions in August, 1975 from intermediaries of Fernando Gallardo.

The basis for finding at least four separate conspiracies consists of the lack of evidence to show that Roche was aware of any of the activities of the other conspiracies; the different time periods involved; and the in-

consistent identities of the vast majority of the participants in the respective conspiracies. The slight link at the top among the conspiracies of an often common source in California and the influence of Fernando Gallardo cannot justify a single indictment of the twenty-four defendants naming sixteen co-conspirators (*United States v. Sperling,* 506 F.2d 1323, 1340-1341 [2d Cir. 1974], *cert. den.* 420 U.S. 962 [1974], 421 U.S. 949 [1975]).

At the close of the Government's case petitioner's trial attorney preserved the multiple conspiracy issue by moving to dismiss the indictment on that ground. The District Court denied the application.

The courts have often observed that in the world of drugs "the suppliers know that the business does not end with their sale to the middlemen, and the distributors know from the vast amounts purchased and its ready availability that their seller has a source of supply" (*United States v. Moten,* 564 F.2d 620, 624-625 [2d Cir. 1977]; see *United States v. Taylor,* 562 F.2d 1345, 1352 [2d Cir. 1977]; *United States v. Lam Lek Chong,* 544 F.2d 58, 65-66 [2d Cir. 1976]; *United States v. Magnano,* 543 F.2d 431, 433-434 [2d Cir. 1976]; *United States v. Ortega-Alvarez,* 506 F.2d 455, 457 [2d Cir. 1974], *cert. den.* 421 U.S. 910 [1975]; *United States v. Bynum,* 485 F.2d 490, 495-496 [2d Cir. 1973], *vacated and remanded on other grounds,* 417 U.S. 903 [1974]). While it cannot be denied that a purchaser of one-half kilogram of heroin on four occasions must have some idea that his supplier's business extends beyond him, it cannot be presumed that he envisions it to extend to the proportions of the "single" conspiracy alleged here. Petitioner was named in two of forty-four overt acts and two of twenty-eight substantive counts.* Of the twenty-three co-defendants and sixteen

*Overt acts 5 and 12 accused petitioner of receiving heroin and counts 4 and 8 accused him of possessing it with the intent to distribute the same.

co-conspirators, only defendant Velasquez and co-conspirator Rivera are linked to petitioner. Benito Cruz, a chief distributor, never met him. None of the other cooperating witnesses mentioned him.

The separate trial of the charges against petitioner and those persons connected with the Rivera conspiracy would not have subjected the Government to substantially more work or a greater number of days on trial. The main witnesses Benito Cruz and Raymond Rivera-Rodriguez—were generally not needed to testify against the same defendants. Each co-conspirator avoided prosecution by testifying against some of his buyers. Ironically, none of their suppliers were on trial. The defendants on trial implicated by Rivera were Zayas, Machado, Nunez-Ramos, Rivera-Santiago, Velasquez, Morales and petitioner. Cruz named Machado, F. Rodriguez and A. Rodriguez as his confederates in the drug business.

Of course, establishment of a variance "does not automatically require reversal" *(United States v. Miley,* 513 F.2d 1191, 1207 [2d Cir.], *cert. den.* 423 U.S. 842 [1975]). The test "is whether the variance affects substantial rights" *(United States v. Agueci,* 310 F.2d 817, 827 [2d Cir. 1962], *cert. den.* 372 U.S. 959 [1963]). For the reasons advanced under reason 2, *infra,* petitioner submits that the variance mandates reversal.

2. The Mass Indictment Question.

A massive trial involving multiple defendants and lasting many weeks makes it "virtually impossible to expect the jury to recognize the limitations of evidence to certain defendants" in *United States v. Moten (supra* at 626). That case involved a 9500-page record. However, twelve of the thirteen appellants in *Moten* were distributors involved in the conspiracy at least for "substantial periods of years" (*id.* at 625).

Here, petitioner's activities were limited in number and terminated in less than three months. He was named

in three of twenty-nine counts, two of forty-four overt acts and linked to but one defendant and one co-conspirator. During the six-week trial, day after day, the jury deciding his fate heard "dozens of incidents of criminal misconduct" not involving him (*United States v. Branker,* 395 F.2d 881, 888 [2d Cir. 1968], *cert. den.* 393 U.S. 1029 [1969]; see *United States v. Bertolotti,* 529 F.2d 149, 157 [2d Cir. 1975]). The jury saw huge amounts of drugs and piles of cash not even remotely connected to petitioner. As the record reveals, his attorney had little to combat and participated sparingly at trial, because most of the proceedings had nothing to do with him. If the evidence compiled against petitioner during the six-week trial were sifted from the 3700-page transcript, it could easily have been presented in less than one day. Instead, petitioner had to sit through and get swallowed up in testimony concerning hundreds of drug transactions and related activities over a two-year period, not to mention various drug business conducted by some co-defendants at trial, notably Velasquez and Fabian Rodriguez, prior to the conspiracy.

Unlike the situation in *United States v. Miley* (*supra* at 1209), the trial was six weeks, rather than five days, and nine out of twenty-four defendants and sixteen co-conspirators, instead of five out of nine persons indicted, were tried.

Moreover, no outward sign that the jury was able to differentiate among the defendants is found in the verdicts. All nine defendants were convicted of all charges against them (see *United States v. Moten, supra* at 627). The jury note requesting the testimony about the finding of heroin upon seven of the defendants on trial at the time of their arrests—a concededly ficticious event—reflects general confusion and the prejudicial spillover effect of the joint trial.

Also, in contrast to the *Moten* case (*supra* at 627)

where none of the appellants testified in his own behalf, counsel for the various defendants did not provide a coordinated defense. For example, Zayas testified and denied making the heroin sales charged; Carlos Santiago testified and called two witnesses to assert an alibi defense; Velasquez and petitioner presented alibi defenses without taking the witness stand; and Anthony Rodriguez called upon his brother to show that he was a drug addict and incapable of forming the specific intent required by the relevant statutes. The antagonistic nature of these defenses becomes clear when it is considered that Rodriguez, in effect, conceded his involvement with drugs and, thereby, enhanced the credibility of the Government's witnesses. In addition, the jury's rejection of any of the other defenses advanced could easily have led to a dismissal of the co-defendants' claims as part and parcel of the same attack upon Raymond Rivera-Rodriguez—the chief witness.

In sum, petitioner was categorized as a middleman in the drug business whose brief involvement with a distributor-courier was buried in an avalanche of damaging, unrelated testimony and exhibits of the drug activities of other people.

This case gives the Court the opportunity to set guidelines as to the permissible limits of the scope of an indictment and a conspiracy. Increasingly, the Government attempts to try as many people as possible together without regard to their actual connection with each other and with resulting prejudice to those defendants brought to trial.

3. The Prosecutorial Misconduct Question.

It is improper for the prosecutor to inject himself into the proceedings and thus become an unsworn witness. He cannot suggest that he possesses evidence or knowledge that a defendant is guilty or otherwise put his own integri-

ty in issue *(Berger v. United States,* 295 U.S. 78, 88-89 [1935]; *United States v. Farnkoff,* 535 F. 2d 661, 668 [1st Cir. 1976]; *United States v. Burse,* 531 F.2d 1151, 1154-1155 [2d Cir. 1976]; *United States v. Puco,* 436 F.2d 761, 762 [2d Cir.], *rev'd and remanded* 453 F.2d 539 [1971], *aff'd* 476 F.2d 1099, *cert. den.* 414 U.S. 844 [1973]). In the same vein, it is improper "to put the prestige of the United States Attorney's Office behind the Government's case" (*United States v. Brawer,* 482 F.2d 117, 134 [2d Cir.], *on remand* 367 F. Supp. 156 [S.D.N.Y. 1973], *aff'd* 496 F.2d 703, *cert. den.* 419 U.S. 1051 [1974]; *United States v. LaSorsa,* 480 F.2d 522, 526 [2d Cir], *cert. den.* 414 U.S. 855 [1973]; *United States v. Benter,* 457 F.2d 1174, 1176 [2d Cir.], *cert. den.* 409 U.S. 842 [1972]).

In the case at bar the prosecutor commented in his rebuttal summation as follows:

> "But perhaps more fundamental to the charge that the government in this case has put the suggestion into the government's witnesses whom they should testify against, that somehow an agent of the federal government has decided that he will try and obtain the conviction of innocent people by putting the names of innocent people into the mouths of government witnesses, if you think that I, if you think that Mr. Ziegler or any other federal agent would jeopardize his or her career beyond a reasonable doubt to convict these people by doing such a thing, then take about 30 seconds in your deliberations; if you think that is what happened here, come back in 30 seconds and acquit every one of them; if that is what this case is about and you think that is what this case is about, you have no business taking any more time than 30 seconds" (419A).

All counsel joined in a motion for a mistrial based upon these remarks. The District Court heard arguments, denied the motion and agreed to give curative instructions in its charge the next day.

The quoted passage dually prejudiced the defense. Firstly, when coupled with previous statements that petitioner's attorney in his summation "raised the innuendo" that Rivera had been fed names and "programmed with these names and told 'You'll testify about these people,' " although he never knew them, it unfairly characterized defense arguments as an accusation that the federal government was framing an innocent man. Secondly, it told the jury that the two young clean-cut prosecutors stood behind and vouched for the credibility of the criminals who cooperated with the Government in a successful effort to extricate themselves.

The thrust of the defense summation was that petitioner was the victim of a lying informant and mistaken beliefs on the part of the detectives formed by his being at the wrong places at the wrong times. Rivera was vigorously attacked as a liar. The agent's testimony was explained as consistent with innocence, rather than guilt. At no time did counsel suggest that they had committed perjury. Significantly, at the conclusion of petitioner's closing arguments, no complaint was voiced that the office of the United States Attorney had been denigrated and no curative instructions thereon were requested.

From these facts, it is submitted, this case falls within the holding of *United States v. Grunberger* (431 F.2d 1062, 1068 [2d Cir. 1970], wherein it was noted that the prosecutor's statements were "not merely an averment of a personal belief . . . based on the evidence adduced at . . . trial." The prosecutor cannot tell the jury that he thinks the defendant is guilty (*United States v. Farnkoff, supra*). Here, the added factor exists that all counsel were specifically warned immediately prior to the closing arguments not to vouch for the credibility of witnesses (Tr. 2991-2992).

Furthermore, it must be emphasized that the defense attack upon the Government's witnesses, no matter how

broadly it may be construed, did not impugn the integrity of the prosecutor's office. Therefore, it cannot be argued that these disputed comments constituted a proper response (see *United States v. Tramunti,* 513 F.2d 1087, 1118-1119 [2d Cir.], *cert. den.* 423 U.S. 832 [1975]; *United States v. Brawer, supra; United States v. LaSorsa, supra; United States v. Benter, supra; United States v. Kiame,* 258 F.2d 924, 934 [2d Cir. 1958]).

The District Court acknowledged that even if the prosecutor had not included himself "in those whose representations might be jeopardized, . . . it was still putting the whole credibility of the United States Government behind these witnesses." Accordingly, it gave instructions to the jury to the effect that attorneys do not vouch for their witnesses. For a number of reasons these remarks could not rectify the situation.

No instructions could remedy this egregious error or sufficiently reverse its impact upon the jury. Anything the judge said could not change the impression left by the young and eager prosecutors that they would not put on an untruthful witness and thereby jeopardize their careers. Of course, here the only issue with respect to petitioner was Rivera's credibility. Moreover, because of the judge's policy at trial, defense counsel were barred from interrupting the rebuttal summation and, perhaps, limiting the effect of the error by nipping it in the bud. A specific request to alter this system solely for the prosecutor's rejoinder was denied. When the court finally dealt with the subject, it was in the second part of its charge given after 2:00 P.M. on the following day. Coming as they did almost twenty-four hours later and as a small part of the charge which consumed over one hundred pages of transcript, the instructions were too late and lost in the plethora of important advice they accompanied.

4. The Indictment In The Jury Room Question.

A copy of the indictment was distributed to each member of the jury to enable him or her to follow along as the judge went over it during his instructions. Although the substantive counts pertaining to defendants not on trial were deleted, in spite of a defense objection, the forty-four overt acts listed in the first count were retained. Near the conclusion of the charge, the trial judge notified the jury that it could utilize its copies of the indictment in the jury room. This error was not cured by the usual cautionary instructions that an indictment is not evidence.

In *United States v. Marquez* (424 F.2d 236, 240 [2d Cir.], *cert. den.* 400 U.S. 828 [1970]), the Court of Appeals upheld the submission of an indictment to the jury upon its request for the same. However, in a more recent case that Court specifically mentioned that "we are neither asked to decide, nor do we express, any view as to whether the jury is to inspect an indictment in any or all criminal prosecutions" (*United States v. Cirami,* 510 F.2d 69, 74 [2d Cir.], *cert. den.* 421 U.S. 964 [1975]).

Since the indictment is not evidence, it should not be included among the exhibits the jury examines in reaching its verdict. In the present case, the overt acts were a summary of the Government's case and amounted to letting the jury read the prosecutor's summation or a synopsis of the direct examination without benefit of the discrepancies and shortcomings elicited on cross-examination. The psychological effect upon a juror of having the indictment before him and the opportunity for him to digest it with the additional sense of sight unavoidably attribute unfounded significance to the accusation.

CONCLUSION

Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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RONALD D. DEGEN
Of Counsel

APPENDIX "A"
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 752, 797-804—September Term, 1977.
(Argued April 14, 1978 Decided April 28, 1978)
Docket Nos. 77-1465-77-1470; 77-1473; 77-1475; 78-1018

UNITED STATES OF AMERICA,

Appellee,

v.

DOMINGO ZAYAS, a/k/a Luis Nunez, a/k/a Luis Maciado, a/k/a Luisito, ORLANDO MACHADO, a/k/a Julito, LUIS NUNEZ-RAMOS, a/k/a Indio, CARLOS RIVERA-SANTIAGO, a/k/a Carlitos, ANGELO ROCHE, a/k/a The Old Man, JOSE VELASQUEZ, a/k/a Vaquero, a/k/a Cowboy, FABIAN RODRIQUEZ, ANTONIO MORALES, a/k/a Tony the Mechanic, ANTHONY RODRIQUEZ, a/k/a Little Tony,

Defendants-Appellants.

Before:
LUMBARD, MANSFIELD, and MESKILL,
Circuit Judges.

Appeal from conviction after trial before Southern District of New York, Broderick, *Judge,* and a jury, on charges of conspiracy to violate narcotics laws.

Affirmed.

JAMES A. MOSS, Assistant United States Attorney (Robert B Fiske, Jr., United States Attorney for the Southern District of New York, Richard F. Ziegler and Richard Weinberg, Assistant United States Attorneys, on the brief), *for Appellee.*

JEROME A. LANDAU, New York, New York, on the brief, *for Defendant-Appellant Domingo Zayas.*

JOHN J. BRODERICK, Syosset, New York, *for Defendant-Appellant Orlando Machado.*

THEODORE KRIEGER, New York, New York, *for Defendant-Appellant Luis Nunez-Ramos.*

HUGH CUNIFFE, New York, New York, *for Defendant-Appellant Carlos Rivera-Santiago.*

O'ROURKE, McGOVERN & DEGEN, and Ronald D. Degen, New York, New York, on the brief, *for Defendant-Appellant Angelo Roche.*

KENNETH LINN, New York, New York, on the brief, *for Defendant-Appellant Jose Velasquez.*

ROBERT MITCHELL, New York, New York, on the brief, *for Defendant-Appellant Fabian Rodriguez.*

MICHAEL P. STOKAMER, New York, New York, on the brief, *for Defendant-Appellant Antonio Morales.*

BONNIE P. JOSEPHS, New York, New York, *for Defendant-Appellant Anthony Rodriguez.*

PER CURIAM:

Luis Nunez-Ramos and eight co-defendants appeal from their convictions after a six-week jury trial before Judge Broderick in the Southern District of New York on

charges of a conspiracy to violate the narcotics laws. We affirm.

The conspiracy involved a quick response of a number of narcotics traffickers to the opportunity provided by the 1973 heroin panic in New York City. As white heroin, normally plentiful, became unavailable on the streets, one Fernando Gallardo and his associates apparently resolved to step into the breach by procuring a supply of Mexican "brown rock" heroin through California sources. Defendants here were charged with being couriers and distributors within the Gallardo organization.

The first contention we address is that defendants' trials ought to have been severed from each other to avoid prejudice. A comparison between the instant case and *United States v. Moten,* 564 F.2d 620 (2d Cir. 1977), will demonstrate that this alleged conspiracy was well within the bounds—of both size and complexity—inside of which we have ruled that no prejudice is caused by a joint trial.

Defendant Carlos Rivera-Santiago alleges that the government improperly led him to believe that he would have to establish an alibi for the last two weeks of October, 1974, and did not disclose until trial that the relevant period was, in fact, earlier in October. This argument fails for a number of reasons. First, the government never assured Santiago that he could limit his alibi to the last two weeks in October. Rather, the entire month of October was specified; only preliminarily did the government estimate that the relevant period would probably be the third and fourth weeks. If Santiago chose to hazard all on this speculation, the risk of disappointment was his. Moreover, he had four weeks after he was advised of the true period involved before he had to put on his defense. Despite at least two trips to Puerto Rico in that time, Santiago was unable to adduce any additional alibi evidence; indeed, to this day he has not pointed to any evidence that

he might have been able to present at trial had he known earlier what the relevant period was. Accordingly, he has failed to show any prejudice.

Defendant Orlando Machado asserts that he was prejudiced by the presentation to the jury of evidence—mistaken identification by a government witness—that was not disclosed to him before trial. In the first place, as Machado's counsel candidly acknowledged, the effect of the misidentification could only have been favorable to Machado in the eyes of the jury. Once the government had conceded that a crucial witness had erred in identifying Machado, it was in Machado's interest that trial continue with the same jury, free to draw from the incident conclusions unfavorable to the reliability of the witness, and therefore helpful to Machado. Moreover, any prejudice that could conceivably have resulted was clearly avoided by Judge Broderick's prompt and repeated curative instruction.

Of some greater weight is the contention that the government's attorney introduced an improper element into his summation when he stated, "if you think that I, if you think that [co-counsel] or any other federal agent would jeopardize his or her career beyond a reasonable doubt to convict these people by doing such a thing [putting thoughts in witnesses' minds], then take about 30 seconds in your deliberations; if you think that is what happened here, come back in 30 seconds and acquit every one of them . . . ." It is true that we have said, and continue to believe, that such statements in summations go beyond the bounds of propriety. But it is equally true that we have permitted convictions to stand in the face of similar, or even more objectionable, language in the government's summation, when the defense has put in issue the question of the government's integrity in its handling of its witnesses. *See, e.g., United States v.*

Tramunti, 513 F.2d 1087 (2d Cir.), *cert. denied,* 423 U.S. 832 (1975); *United States v. Benter,* 457 F.2d 1174 (2d Cir.), *cert. denied,* 409 U.S. 842 (1972). We conclude that, in the circumstances of this case, the prosecutor's remark does not constitute reversible error.

We have considered the defendants' other arguments and find that they are without merit. Accordingly, the convictions are affirmed.

APPENDIX "B"
INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

FERNANDO GALLARDO, a/k/a Frank Zayas, MARTHA MACHADO, a/k/a Martha Vargas, a/k/a Martha Gallardo, CARLOS GALLARDO, a/k/a Carlos Santiago-Bautista, HERMINIO GUTIERREZ, a/k/a Cuba, DOMINGO ZAYAS, a/k/a Luis Nunez, a/k/a Luis Machado, a/k/a Luisito, ORLANDO MACHADO, a/k/a Julito, WILFREDO MACHADO, HILDA GRACIA, a/k/a Carlos Gallardo's wife, JOSE LUIS IGLESIAS, a/k/a Chegui, LUIS NUNEZ-RAMOS, a/k/a Indio, CARLOS RIVERA-SANTIAGO, a/k/a Carlitos, ANGELO ROCHE, a/k/a The Old Man, JOSE VELASQUEZ, a/k/a Vaquero, a/k/a Cowboy, MOISES MALDONADO, GILBERTO TORRES, a/k/a Little Gilbert, FABIAN RODRIGUEZ, RICARDO TIRADO, LUIS RODRIGUEZ, JOSE LUIS TERSON, a/k/a The Old Man, VICTOR MEDINA, a/k/a Vitin, ANTONIO MORALES, a/k/a Tony the Mechanic, RICARDO GARCIA, ANTHONY RODRIGUEZ, a/k/a Little Tony, and JOHN DOE, a/k/a Pumarejo,

Defendants.

COUNT ONE

The Grand Jury charges:

I. THE CONSPIRACY

1. From on or about the 1st day of October 1973, and continuously thereafter up to and including the 6th day of November, 1975, in the Southern District of New York and elsewhere:

FERNANDO GALLARDO, a/k/a Frank Zayas, MARTHA MACHADO, a/k/a Martha Vargas, a/k/a Martha Gallardo, CARLOS GALLARDO, a/k/a Carlos Santiago-Bautista, HERMINO GUTIERREZ, a/k/a Cuba, DOMINGO ZAYAS, a/k/a Louis Nunez, a/k/a Luis Machado, a/k/a Luisito, ORLANDO MACHADO, a/k/a Julito, WILFREDO MACHADO, HILDA GRACIA, a/k/a Carlos Gallardo's wife, JOSE LUIS IGLESIAS, a/k/a Chegui, LUIS NUNEZ-RAMOS, a/k/a Indio, CARLOS RIVERA-SANTIAGO, a/k/a Carlitos, ANGELO ROCHE, a/k/a The Old Man, JOSE VELASQUEZ, a/k/a Vaquero, a/k/a Cowboy, MOISES MALDONADO, GILBERTO TORRES, a/k/a Little Gilbert, FABIAN RODRIGUEZ, RICARDO TIRADO, LUIS RODRIGUEZ, JOSE LUIS TERSON, a/k/a The Old Man, VICTOR MEDINA, a/k/a Vitin, ANTONIO MORALES, a/k/a Tony the Mechanic, RICARDO GARCIA, ANTHONY RODRIGUEZ, a/k/a Little Tony, and JOHN DOE, a/k/a Pumarejo.

the defendants, and others to the Grand Jury known and unknown, including:

Fernando Valenzuela-Verdugo, Hector Ramos-Iribe, Humberto Ramos-Serrano, a/k/a Colorado, a/k/a

Red, Francisco Machado, a/k/a Paco, a/k/a Paquito, Jane Doe, a/k/a Carmen, a/k/a Paco's wife, Felix Machado, a/k/a Felde, a/k/a Ferde, William Cortes-Rios, Raymond Rivera, Benito Cruz, a/k/a Nino, Jose Rivera, a/k/a Rico, Raymond Rossy, Hermenigildo Diaz-Caballero, a/k/a Puton, Raphael Gonzalez, a/k/a Flaco, Ramon DeJesus-Cortes, a/k/a Ramoncito, Raymond Valentine, and Herman Rosa,

named herein as co-conspirators, but not as defendants, unlawfully, intentionally and knowingly, combined, conspired, confederated and agreed together and with each other, to violate the narcotics laws of the United States, specifically Sections 812, 841(a)(1), 841(b)(1)(A), 951, 952 and 960 of Title 21, United States Code.

II. OBJECTS OF THE CONSPIRACY

2. It was an object of the conspiracy charged herein to unlawfully import and bring into the United States from Mexico large amounts of narcotic drugs, specifically "brown rock" heroin, in violation of Sections 951, 952 and 960 of Title 21, United States Code.

3. It was a further object of said conspiracy to unlawfully distribute and possess with intent to distribute, in this country Mexican "brown rock" heroin, a Schedule I narcotic drug controlled substance, in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

III. MEANS OF THE CONSPIRACY

4. Among the means by which the defendants and co-conspirators would and did carry out these objects, and insure the success of their unlawful venture to import,

possess and distribute Mexican "brown rock" heroin, were the following:

The conspiracy took the form of a loose-knit business organization, with members of the conspiracy carrying out four basic functions.

(i) Certain co-conspirators based in and around Los Angeles, California (and herein referred to as "the Valenzuela organization") served as importers and sources of supply of heroin.

(ii) Other members of the conspiracy organized, supervised, managed, controlled and financed a New York City-based narcotics distribution organization (hereinafter "the Gallardo organization"), which directed the activities of couriers and middle-level distributors of heroin.

(iii) Couriers of the Gallardo organization travelled between New York City and Los Angeles, California in order to purchase Mexican "brown rock" heroin in multi-kilogram quantities from the Valenzuela organization.

(iv) In turn, these couriers distributed this heroin in wholesale quantities to certain defendants and co-conspirators in New York City who operated as middlemen, purchasing the heroin and, in turn, selling it to their respective customers.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

1. In August 1974, defendants FERNANDO GALLARDO, a/k/a Frank Zayas, MARTHA MACHADO, a/k/a Martha Vargas, a/k/a Martha Gallardo, CARLOS GALLARDO, a/k/a Carlos Santiago-Bautista, HERMINIO GUTIERREZ, a/k/a Cuba, and HILDA GRACIA, a/k/a Carlos Gallardo's

wife, and co-conspirators William Cortes-Rios and Raymond Rivera attended a meeting in Puerto Rico and discussed the admission of Raymond Rivera into the Gallardo organization.

2. In August 1974, co-conspirators William Cortes-Rios and Raymond Rivera travelled from New York City to Los Angeles, California in order to purchase approximately eleven quarter-kilogram packages of heroin from co-conspirator Hector Ramos-Iribe, a member of the Valenzuela organization.

3. In and about August and September 1974, in New York City, co-conspirators William Cortes-Rios and Raymond Rivera distributed and sold approximately eleven quarter-kilogram packages of heroin for approximately $108,000.

4. In and about August or September 1974, in New York City, the defendant HERMINIO GUTIERREZ, a/k/a Cuba, received approximately one-quarter of a kilogram of heroin.

5. In or about August or September 1974, in New York City, the defendant ANGELO ROCHE, a/k/a The Old Man, received approximately one-half of a kilogram of heroin.

6. In or about August or September 1974, in New York City, the defendant JOSE VELAZQUEZ, a/k/a Vaquero, a/k/a Cowboy, received approximately one-quarter of a kilogram of heroin.

7. In or about August or September 1974, in New York City, the defendant MOISES MALDONADO received approximately one-quarter of a kilogram of heroin.

8. In and about August or September 1974, in New York City, defendant JOSE LUIS IGLESIAS, a/k/a Chegui, and co-conspirator Raymond Rivera discussed the sale of heroin to customers on the Lower East Side of Manhattan.

9. In or about early September 1974, co-conspirator Raymond Rivera travelled from New York City to Los Angeles, California in order to purchase approximately 14 quarter-kilogram packages of heroin from co-conspirator Hector Ramos-Iribe, a member of the Valenzuela organization.

11. In September 1974, in New York City, the defendant LUIS NUNEZ-RAMOS, a/k/a Indio, received approximately one-quarter of a kilogram of heroin.

12. In September 1974, in New York City, the defendant ANGELO ROCHE, a/k/a The Old Man, received approximately one-half of a kilogram of heroin.

13. In September 1974, in New York City, the defendant JOSE VELAQUEZ, a/k/a Vaquero, a/k/a Cowboy, received approximately one-quarter of a kilogram of heroin.

14. In September 1974, in New York City, the defendant MOISES MALDONADO received approximately one-quarter of a kilogram of heroin.

15. In September 1974, in New York City, the defendant RICARDO TIRADO received approximately one-eighth of a kilogram of heroin.

16. In September 1974, in New York City, the defendant LUIS RODRIGUEZ received approximately one-eighth of a kilogram of heroin.

17. In September 1974, in New York City, the defendant JOSE LUIS TERSON, a/k/a The Old Man, received approximately one-eighth of a kilogram of heroin.

18. In September 1974, in New York City, the defendant VICTOR MEDINA, a/k/a Vitin, received approximately one-quarter of a kilogram of heroin.

19. In September 1974, in New York City, the defendant ANTONIO MORALES, a/k/a Tony the Mechanic, received approximately one-quarter of a kilogram of heroin.

20. In September 1974, in New York City, the defen-

dant Ricardo Garcia received approximately one-eighth of a kilogram of heroin.

21. In September 1974, in New York City, co-conspirator Raymond Rivera delivered approximately $120,000 in cash, the proceeds from the sale of heroin to customers of the Gallardo organization.

22. In September 1974, in New York City, defendants FERNANDO GALLARDO, a/k/a Frank Zayas, MARTHA MACHADO, a/k/a Martha Vargas, a/k/a Martha Gallardo, and CARLOS GALARDO, a/k/a Carlos Santiago-Bautista, and co-conspirators Francisco Machado, a/k/a Paco, a/k/a Paquito, and Jane Doe, a/k/a Carmen, a/k/a Paco's wife, counted approximately $120,000 in cash.

23. In September 1974, defendants FERNANDO GALLARDO, a/k/a Frank Zayas, and MARTHA MACHADO, a/k/a Martha Vargas, a/k/a Martha Gallardo, travelled to California with a large quantity of money and met with members of the Valenzuela organization.

24. In or about late September or early October 1974, co-conspirator Raymond Rivera travelled from New York City to Los Angeles, California in order to receive approximately 16 quarter-kilogram packages of heroin from co-conspirator Hector Ramo-Iribe, a member of the Valenzuela organization.

25. In or about late September or early October 1974, in New York City, the defendant LUIS RODRIGUEZ received approximately one-quarter of a kilogram of heroin.

26. In October 1974, co-conspirator Raymond Rivera travelled from New York City to Los Angeles, California in order to receive approximately ten quarter-kilogram packages of heroin from co-conspirator Hector Ramos-Iribe, a member of the Valenzuela organization.

27. In October 1974, in New York City, co-

conspirator Raymond Rivera delivered approximately ten quarter-kilogram packages of heroin to defendants LUIS NUNEZ-RAMOS, a/k/a Indio, and CARLOS RIVERA-SANTIAGO, a/k/a Carlitos.

28. In October 1974, in New York City, defendants LUIS NUNEZ-RAMOS, a/k/a Indio, CARLOS RIVERA-SANTIAGO, a/k/a Carlitos, and JOSE LUIS IGLESIAS, a/k/a Chegui, and co-conspirator Raymond Rivera had a discussion concerning the sale of heroin to customers of the Gallardo organization.

29. In and about October and November 1974, defendant FERNANDO GALLARDO, a/k/a Frank Zayas, and co-conspirator Raymond Rivera travelled separately from New York City to Los Angeles, California.

30. In November 1974, in the vicinity of Los Angeles, California, defendant FERNANDO GALLARDO, a/k/a Frank Zayas, and co-conspirator Raymond Rivera received approximately 35 quarter-kilograms of heroin from co-conspirators Fernando Valenzuela, Hector Ramos-Iribe and other members of the Valenzuela organization, in exchange for approximately $190,000 in cash.

31. In November 1974, defendant FERNANDO GALLARDO, a/k/a Frank Zayas, and co-conspirator Raymond Rivera checked into the George Washington Hotel, New York, New York with approximately 35 quarter-kilograms of heroin in their possession.

32. In November 1974, in New York City, co-conspirator Raymond Rivera delivered on three separate occasions to defendants FERNANDO GALLARDO, a/k/a Frank Zayas, MARTHA MACHADO, a/k/a Martha Vargas, a/k/a Martha Gallardo, and CARLOS GALLARDO, a/k/a Carlos Santiago-Bautista, and co-conspirator William Cortes-Rios, a total of approximately $250,000 in cash, the proceeds from the sale of heroin to customers of the Gallardo organization.

33. In or about December 1974 or January 1975, in

New York City, the defendant FERNANDO GALLARDO, a/k/a Frank Zayas, distributed approximately one and one-quarter kilograms of heroin to defendants GILBERTO TORRES, a/k/a Little Gilbert, and FABIAN RODRIGUEZ.

34. In or about December 1974 or January 1975, defendant WILFREDO MACHADO travelled from New York City to Los Angeles, California in order to receive approximately seven and one-half kilograms of heroin from members of the Valenzuela organization.

35. In January 1975, defendants FERNANDO GALLARDO, a/k/a Frank Zayas, MARTHA MACHADO, a/k/a Martha Vargas, a/k/a Martha Gallardo, and ORLANDO MACHADO, a/k/a Julito, travelled from New York City to Los Angeles, California in order to pick up approximately twelve and one-half kilograms of heroin from members of the Valenzuela organization.

36. During January 1975, in New York City, co-conspirator Benito Cruz, a/k/a Nino, distributed approximately ten and one-half kilograms of heroin to customers of the Gallardo organization.

37. In January 1975, in New York City, co-conspirator Bento Cruz, a/k/a Nino, drew up a list of certain persons to whom he had recently distributed heroin, indicating the amount and price of the heroin distributed.

38. In January 1975, in New York City, co-conspirator Raymond Rivera distributed approximately one-half of a kilogram of heroin to defendant JOSE LUIS IGLESIAS, a/k/a Chegui.

39. In the early part of 1975, defendant DOMINGO ZAYAS, a/k/a Luis Nunez, a/k/a Luis Machado, a/k/a Luisito, travelled from New York City to Los Angeles, California on two separate occasions in order to pick up quantities of heroin from members of the Valenzuela organization.

40. During the Spring of 1975, in New York City, co-conspirator Raymond Rivera delivered on numerous occasions to defendants MARTHA MACHADO, a/k/a Martha Vargas, a/k/a Martha Gallardo, CARLOS GALLARDO, a/k/a Carlos Santiago-Bautista, JOHN DOE, a/k/a Pumerejo, and HILDA GRACIA, a/k/a Carlos Gallardo's wife and co-conspirator Willie Cortes-Rios, a total of approximately $500,000, the proceeds from the sale of heroin to customers of the Gallardo organization.

41. In or about August 1975, in New York City, defendants HERMINIO GUTIERREZ, a/k/a Cuba, and ANTHONY RODRIGUEZ, a/k/a Little Tony, distributed approximately one-quarter of a kilogram of heroin to co-conspirator Raymond Valentine.

42. In or about August 1975, in New York City, defendants FERNANDO GALLARDO, a/k/a Frank Zayas, and HERMINO GUTIERREZ, a/k/a Cuba, and co-conspirator Raymond Valentine had discussions concerning the price of quarter-kilograms of heroin.

43. On or about September 12, 1975, in New York City, defendant FERNANDO GALLARDO, a/k/a Frank Zayas, and co-conspirators Benito Cruz, a/k/a Nino, and Herman Rosa discussed the sale of approximately one-half of a kilogram of heroin to another individual.

44. On or about Octrober 15, 1975, in New York City, defendant FERNANDO GALLARDO, a/k/a Frank Zayas, and co-conspirator BENITO CRUZ, a/k/a Nino, and HERMAN ROSA discussed the sale of approximately five kilograms of heroin to another individual.

(Title 21, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

From on or about the 1st day of October, 1973, and continuously thereafter up to and including the date of the

filing of this indictment, in the Southern District of New York, FERNANDO GALLARDO, the defendant, unlawfully, wilfully, intentionally and knowingly did engage in a continuing criminal enterprise in that he unlawfully, wilfully, intentionally and knowingly did violate Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A) as alleged in Counts Nineteen, Twenty-three, Twenty-eight and Twenty-nine of this indictment, which are incorporated by reference herein, and did commit other violations of said statutes, which violations were part of a continuing series of violations of said statutes undertaken by the defendant in concert with at least five other persons with respect to whom the defendant FERNANDO GALLARDO occupied a position of organizer, supervisor and manager and from which continuing series of violations the defendant FERNANDO GALARDO obtained substantial income and resources.

(Title 21, United States Code, Section 848.)

COUNT THREE

The Grand Jury further charges:

In or about August or September 1974, in the Southern District of New York, HERMINIO GUTIERREZ, a/k/a Cuba, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-quarter of a kilogram of heroin.

(Title 21, United States Code, Section 812, 841(a)(1) and 841(b)(1)(A).)

COUNT FOUR

The Grand Jury further charges:

In or about August or September 1974, in the Southern District of New York, ANGELO ROCHE,

a/k/a The Old Man, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-half of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT FIVE

The Grand Jury further charges:

In or about August or September 1974, in the Southern District of New York, JOSE VELASQUEZ, a/k/a Vaquero, a/k/a Cowboy, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-quarter of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT SIX

The Grand Jury further charges:

In or about August or September 1974, in the Southern District of New York, MOISES MALDONADO, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-quarter of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT SEVEN

The Grand Jury further charges:

In September 1974, in the Southern District of New York, LUIS NUNEZ-RAMOS, a/k/a Indio, the defen-

dant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-quarter of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT EIGHT

The Grand Jury further charges:

In September 1974, in the Southern District of New York, ANGELO ROCHE, a/k/a The Old Man, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-half of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT NINE

The Grand Jury further charges:

In September 1974, in the Southern District of New York, JOSE VELASQUEZ, a/k/a Vaquero, a/k/a Cowboy, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-quarter of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT TEN

The Grand Jury further charges:

In September 1974, in the Southern District of New York, MOISES MALDONADO, the defendant,

unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-quarter of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT ELEVEN

The Grand Jury further charges:

In September 1974, in the Southern District of New York, RICHARDO TIRADO, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-eighth of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT TWELVE

The Grand Jury further charges:

In September 1974, in the Southern District of New York, LUIS RODRIGUEZ, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-eighth of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT THIRTEEN

The Grand Jury further charges:

In September 1974, in the Southern District of New York, JOSE LUIS TERSON, a/k/a The Old Man, the defendant, unlawfully, intentionally and knowingly did

possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-eight of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT FOURTEEN

The Grand Jury further charges:

In September 1974, in the Southern District of New York, VICTOR MEDINA, a/k/a Vitin, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-quarter of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT FIFTEEN

The Grand Jury further charges:

In September 1974, in the Southern District of New York, ANTONIO MORALES, a/k/a Tony the Mechanic, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-quarter of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT SIXTEEN

The Grand Jury further charges:

In September 1974, in the Southern District of New York, RICHARDO GARCIA, the defendant,

unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-eighth of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT SEVENTEEN

The Grand Jury further charges:

In or about late September or early October 1974, in the Southern District of New York, LUIS RODRIGUEZ, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-quarter of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT EIGHTEEN

The Grand Jury further charges:

In October 1974, in the Southern District of New York, JOSE LUIS IGLESIAS, a/k/a Chegui, LUIS NUNEZ RAMOS, a/k/a Indio, and CARLOS RIVERA-SANTIAGO, a/k/a Carlitos, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two and one-half kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT NINETEEN

The Grand Jury further charges:

In or about November 1974, in the Southern District of New York, FERNANDO GALLARDO, a/k/a Frank Zayas, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 35 quarter-kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT TWENTY

The Grand Jury further charges:

In or about December 1974 or January 1975, in the Southern District of New York, FERNANDO GALLARDO, a/k/a Frank Zayas, GILBERTO TORRES, a/k/a Little Gilbert, and FABIAN RODRIGUEZ, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one and one-quarter kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT TWENTY-ONE

The Grand Jury further charges:

In or about December 1974 or January 1975, in the Southern District of New York, WILFREDO MACHADO, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Scheduie I narcotic drug controlled substance,

to wit, approximately seven and one-half kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT TWENTY-TWO

The Grand Jury further charges:

In or about January 1975, in the Southern District of New York, GILBERTO TORRES, a/k/a Little Gilbert, and FABIAN RODRIGUEZ, the defendants, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT TWENTY-THREE

The Grand Jury further charges:

In or about January 1975, in the Southern District of New York, FERNANDO GALLARDO, a/k/a Frank Zayas, MARTHA MACHADO, a/k/a Martha Vargas, a/k/a Martha Gallardo, and ORLANDO MACHADO, a/k/a Julito, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distriute a Schedule I narcotic drug controlled substance, to wit, approximately twelve and one-half kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

COUNT TWENTY-FOUR

The Grand Jury further charges:

In or about January 1975, in the Southern District of New York, VICTOR MEDINA, a/k/a Vitin, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-quarter of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

COUNT TWENTY-FIVE

The Grand Jury further charges:

In or about January 1975, in the Southern District of New York, JOSE LUIS IGLESIAS, a/k/a Chegui, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-half of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT TWENTY-SIX

The Grand Jury further charges:

In or about February or March 1975, in the Southern District of New York, DOMINGO ZAYAS, a/k/a Luis Nunez, a/k/a Luis Machado, a/k/a Luisito, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately three and one-half kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT TWENTY-SEVEN

The Grand Jury further charges:

In or about August 1975, in the Southern District of New York, HERMINIO GUTIERREZ, a/k/a Cuba, and ANTHONY RODRIGUEZ, a/k/a Little Tony, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-quarter of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section.)

COUNT TWENTY-EIGHT

The Grand Jury further charges:

On or about the 12th day of September, 1975, in the Southern District of New York, FERNANDO GALLARDO, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-half of a kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), Title 18, United States Code, Section 2.)

COUNT TWENTY-NINE

The Grand Jury further charges:

On or about the 15th day of October, 1975 in the Southern District of New York, FERNANDO GALLARDO, the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately five kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

s/ Emil H. Katz
FOREMAN

s/ Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

No. 77-1685

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANGELO ROCHE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1978. The petition for a writ of certiorari was filed on May 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established a single conspiracy as charged in the indictment.

2. Whether petitioner was prejudiced by the joint prosecution with his eight co-defendants.

3. Whether the prosecutor in closing argument improperly vouched for the credibility of government witnesses.

4. Whether it was proper for the district court to provide the jury with copies of the indictment.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of possessing with intent to distribute a controlled substance, in violation of 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(A) (Counts IV and VIII), and of conspiring to violate the narcotics laws of the United States, in violation of 21 U.S.C. 951, 952 and 960 (Count I) (Pet. App. 6a-26a).[1] He was sentenced to three concurrent 15-year terms of imprisonment, to be followed by a special parole term of 15 years. The court of appeals affirmed (Pet. App. 5a).

The evidence at trial showed the existence of a widespread narcotics organization whose members were responsible for the distribution in New York of hundreds of kilograms of Mexican "brown rock"

[1] The indictment charged petitioner and 23 other defendants in twenty-nine counts with various violations of the federal narcotics laws.

heroin during the period 1973-1975. The conspiracy, headed by one Fernando Gallardo, was formulated in order to take advantage of the scarcity of white heroin in New York during that period by procuring a supply of Mexican "brown rock" heroin through California sources. Gallardo's suppliers in California would import the heroin from Mexico and deliver it to couriers who had flown from New York to Los Angeles to collect the heroin (Tr. 223-225, 264, 323-325, 351, 370, 381-383, 1345-1346, 1350-1351, 2203-2204). These couriers would return to New York with the heroin and there deliver it to a regular group of wholesale distributors, who in turn would distribute it to other distributors, among them petitioner (Tr. 235-248, 250-253, 255-257, 271-280, 294-313, 331-346). The heroin would eventually be sold to the ultimate customer and user of the heroin.

During the early period of the conspiracy, Gallardo would himself fly to Los Angeles to purchase quantities of heroin. Once he had established a direct contact with the source of supply in California, Gallardo cut several of the original conspirators out of the venture (Tr. 2060-2062). By the Spring and Summer of 1974, Gallardo had established an organization of persons who assisted him in distributing heroin in New York City (Br. 6).

During the latter part of 1974 and 1975, Gallardo relied upon others, including his brother, his wife, and several of his brothers-in-law to "stash" heroin that was flown into New York City from California, as well as to count and "launder" the proceeds derived

from the distribution there of this heroin (Tr. 232-233, 257-258, 311-312, 315-319, 328-329, 346, 368, 393, 398-400, 415-418, 425-426; Br. 6). At times, other conspirators assumed temporary responsibility for the operation of this organization—either because Gallardo delegated this authority to them (Tr. 2080, 2117), or because Gallardo was incarcerated on state criminal charges (Tr. 409-410).

ARGUMENT

1. Petitioner contends (Pet. 4-7) that the proof at trial revealed several independent and separate conspiracies, rather than the single conspiracy alleged in the indictment. He rests this contention on the lack of evidence at trial to show that he was aware of the entire range of activities of the Gallardo organization, or the different time periods involved, and on the "inconsistent identities" of the majority of the participants. The evidence demonstrates, however, that the jury, which was properly instructed on the multiple conspiracy issue (Tr. 3543-3544), see *United States* v. *Tramunti*, 513 F.2d 1087 (C.A. 2), certiorari denied, 423 U.S. 832 and *United States* v. *Bynum*, 485 F.2d 490 (C.A. 2), vacated on other grounds, 417 U.S. 903, was justified in finding that the government had proved the existence of a single, albeit massive, conspiracy. That evidence revealed a typical chain conspiracy in which all wholesalers, couriers, and distributors worked for a core group controlled by Gallardo and his assistants. Gallardo organized the trips to California to pick up quantities

of heroin ranging up to twelve and one-half kilograms at a time, and the proceeds from the sales made by the distributors, including petitioner, were paid to Gallardo or one of his assistants. The very scale of the conspiracy's operation was sufficient for the jury to infer each defendant's awareness of the entire venture, including its vertical and horizontal scope. See, *e.g.*, *United States* v. *Magnano*, 543 F.2d 431, 434 (C.A. 2), certiorari denied, 429 U.S. 1091; *United States* v. *Miley*, 513 F.2d 1191, 1206-1207 (C.A. 2), certiorari denied, 423 U.S. 842. Moreover, the proof established that the defendants on trial dealt directly with a distributor designated by Gallardo,[2] acted themselves as large-scale distributors, or flew to California to bring suitcases of heroin to New York. No defendant dealt in less than quarter-kilogram quantities of heroin. Accordingly, the case is governed by *Blumenthal* v. *United States*, 332 U.S. 539.

Petitioner's further contention (Pet. 4-6) that the changes in the conspiracy's membership and the shifting of roles within the conspiracy over a two-year period reflected the existence of four or five separate conspiracies is without foundation. It is well recognized that "[c]onspiracies are often agreements in flux * * * and a single conspiracy is not transposed into a multiple one simply by lapse of time, * * *

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[2] Petitioner on four occasions purchased heroin from co-defendant Raymond Rivera-Rodriguez in late Summer and Fall of 1974 (Tr. 243-245, 250-251, 271-272, 277-278, 332, 392-393).

change in membership * * * or a shifting emphasis in its locale of operations * * *." *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 790 (C.A. 2), certiorari denied, 430 U.S. 917. Whatever changes in personnel the conspiracy underwent, or shifting of roles within the conspiracy, it is evident that Gallardo headed a single conspiracy consisting of an established cadre of couriers and distributors, and that Gallardo's activity was central to the involvement of all. See *United States* v. *Moten*, 564 F.2d 620, 625 (C.A. 2), certiorari denied, 434 U.S. 959.

2. Petitioner contends (Pet. 7-9) that the joint prosecution of nine defendants, combined with the length of trial and the volume of evidence, denied him a fair trial. There is, however, no basis for concluding that the jury was unable to consider the evidence pointing to petitioner's guilt independently of the evidence relating to his co-defendants. See, *e.g.*, *United States* v. *Moten*, *supra*, 564 F.2d at 627.

Although the trial was comparatively long[3] and involved nine co-defendants, the issues were not so complicated that the jury was unable to differentiate among the several co-defendants. The trial involved a simple narcotics conspiracy, proof of which turned mainly on whether the jury believed government wit-

[3] Petitioner to the contrary (Pet. 7-8), the trial was not of unusual length. Although some six weeks passed from the start of jury selection until verdict, the evidence was presented in only fourteen trial days. The balance of time largely was accounted for by the four-day week trial schedule, three days of jury selection, two days of summations, and two days of deliberations by the jury.

nesses who testified to personal dealings in heroin with the defendants, including petitioner. As the Second Circuit has stated in a related context, a narcotics conspiracy "[is] not an antitrust or securities fraud case involving esoteric theories of law and complex business transactions beyond the ken of the ordinary juror. The purchase and sale of hard drugs is basically a simple operation, easily understandable * * *." *Moten, supra*, 564 F.2d at 627.

Indeed, the trial proved sufficiently straightforward that all defense counsel concurred in requesting the district judge to dispense with his proposal to marshal the evidence in his charge to the jury (Tr. 2579), thus belying the present contention that the evidence at trial unduly challenged the capacity of the jury to analyze the matter independently as to each defendant. Moreover, the district court repeatedly instructed the jury to consider each defendant individually (Tr. 3497, 3528, 3550, 3551, 3555-3556, 3559, 3594, 3595), and in concluding the charge the court asked each defendant and his attorney to stand in turn, as he called their names to the jury (Tr. 3595-3596).

That the jury heeded the trial court's admonitions was amply demonstrated during the course of its deliberations. The jury submitted eleven notes to the court posing questions concerning the evidence at trial. Of these notes, eight requested the reading of testimony specifically relating to six of the nine defendants, including petitioner (Tr. 3605-3606, 3607, 3640, 3669, 3670, 3684, 3694). Two of the remaining notes requested that only testimony directly applica-

ble to the defendants on trial be provided (Tr. 3648-3649, 3669). These notes illustrate that the jurors considered each defendant individually, properly distinguishing between the conduct of the defendants on trial and that of their co-conspirators.[4]

Finally, petitioner ignores the fact that in a separate trial, the same evidence would have been admissible to demonstrate the substantial scale of the conspiracy with which he was charged. As the Court of Appeals for the Second Circuit stated in *United States* v. *Stromberg*, 268 F.2d 256, 266, certiorari denied, 361 U.S. 863:

> [W]e must not lose sight of the fact that the difficulties which the appellants envisage stem from the number of conspirators rather than the number of defendants on trial. The same evidence would have been admissible similarly subject to

[4] Petitioner seizes (Pet. 8) upon one ambiguous jury note as reflecting the general confusion of the jury and the prejudicial spillover effect of the joint trial. That note (Tr. 3622-3623) requested "[t]estimony of undercover agents who found heroin on seven of the defendants, not except Angelo, The Old Man, and from whom agents bought heroin." The court decided to respond to this concededly ambiguous request by having the testimony of all undercover agents read to the jury (Tr. 3643). That course led to subsequent notes, asking that the testimony be limited to that relating to the defendants on trial. In light of the clearly focused deliberations disclosed by the other notes, the inference petitioner seeks to draw from one ambiguous message is wholly unwarranted. Further, to the extent some of the jurors may have misrecollected the evidence at the time that note was submitted, the reading of the testimony in response to the note served to refresh their understanding of the evidence

> connection and the same problems would have arisen if each of the appellants had been tried separately. In the one situation as in the other, the number of conspirators would have been the same.

Nor is this a case in which one defendant was affected by inflammatory evidence which was admissible solely against a co-defendant, or in which the proof of one or two defendants on trial overshadowed that offered against the remainder.[5]

3. Petitioner alleges (Pet. 9-12) that the government improperly vouched for the credibility of its witnesses by remarking in rebuttal summation that the jury should acquit the defendants if it thought the government had suggested to its witnesses that

[5] Petitioner's reliance (Pet. 8) on *United States* v. *Branker*, 395 F.2d 881 (C.A. 2), certiorari denied *sub nom. Lacey* v. *United States*, 393 U.S. 1029, and *United States* v. *Bertolotti*, 529 F.2d 149 (C.A. 2), to establish prejudice from the admission of proof of the conspiracy and the conduct of co-conspirators, is misplaced. In *Branker*, eight defendants were tried on an 81 count indictment, the first count charging them with conspiring fraudulently to obtain tax refunds to which the recipients were not entitled. There, however, the conspiracy count was withdrawn from the jury's consideration, with the result that much evidence that would not have been used against the defendants in a separate trial on the substantive counts was introduced at the joint trial. In *Bertolotti*, 17 defendants were tried together on an assortment of federal narcotics violations, the first count of the indictment charging the defendants and 12 other individuals with one overall conspiracy to distribute narcotics. The court found, however, that the government had merely merged in the indictment several conspiracies for the sake of convenience, and that the appellants had been prejudiced by the variance. No such circumstances exist here.

they "frame" innocent people. However, as the court of appeals found (Pet. App. 4a-5a), such statements are not reversible error when the defense, as here, has put in issue the question of the government's integrity in its handling of its witnesses.

Throughout the trial, the defense attorneys repeatedly sought to discredit as fabricated the testimony of the government witnesses, who were strenuously cross-examined about the length of time they had been prepared to testify by assistant United States attorneys (Tr. 454-457, 1496-1497, 1868-1870, 2236-2238) and other government agents (Tr. 585, 656-658, 2234-2236, 2701-2704), about "deals" they had made with the government (Tr. 670, 704), and about their probated sentences as compared to the prison terms of other conspirators (Tr. 643-644, 663). During closing arguments, the defense attorneys continually characterized the government's witnesses as "liars," "perjurers," and "con men" who had bought their way out of jail and "sold the government a bill of goods," and whose testimony had been well prepared (Tr. 3098-3100, 3111-3112, 3138-3142, 3145-3149, 3155, 3186, 3225-3226, 3271A, 3288-3289, 3294, 3304, 3307, 3341-3343, 3346-3347, 3357). They were further characterized as "pernicious characters" who were making a living testifying and who were being "fed and cared for by the government" (Tr. 3106, 3181-3182), which was trying to obtain a conviction by using perjured testimony (Tr. 3272). Finally, petitioner's attorney implied to the jury that a government agent had suggested to a witness that he implicate petitioner (Tr. 3192-3194).

Although it is improper to put the prestige of the United States Attorney's office behind the government's case, it is well settled that statements such as those made by the government here, to rebut attacks made directly against government witnesses, and directly or indirectly against the office of the United States Attorney, are not reversible error. *United States* v. *Tramunti*, 513 F.2d 1087 (C.A. 2), certiorari denied, 423 U.S. 832; *United States* v. *Brawer*, 482 F.2d 117 (C.A. 2), certiorari denied, 419 U.S. 1051; *United States* v. *Benter*, 457 F.2d 1174 (C.A. 2), certiorari denied, 409 U.S. 842.*

4. Petitioner finally contends (Pet. 13) that the district court improperly provided the jurors with a copy of the indictment, notwithstanding the fact that the substantive counts pertaining to defendants not on trial had been deleted. This claim is without merit.

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* Contrary to petitioner's assertions (Pet. 11-12), the statements made by defense counsel throughout the trial *did* "impugn the integrity of the prosecutor's office." In *Benter*, *supra*, 457 F.2d at 1176-1177, under factual circumstances similar to those here, the court stated:

> [T]he defense brought this line of argument on itself, [when defense counsel referred to the fact that witnesses had not been prosecuted nor would they be].
>
> * * * * *
>
> The above defense point insinuated that there was an agreement between the government and [two of the witnesses] for them to testify and, by implication, the plentiful references to the Government's witnesses being "crooks" and "poor liars" constituted a charge that there was a "frame" of the defendant. To this argument by inference the Government was entitled to reply * * *.

A decision to submit the indictment to the jury is within the sound discretion of the trial court. *United States* v. *Polizzi*, 500 F.2d 856, 876 (C.A. 9), certiorari denied, 419 U.S. 1120; *United States* v. *Murray*, 492 F.2d 178, 193 (C.A. 9), certiorari denied *sub nom. Roberts* v. *United States*, 419 U.S. 854; *United States* v. *Skolek*, 474 F.2d 582, 586 (C.A. 10); *Dallago* v. *United States*, 427 F.2d 546, 553 (C.A. D.C.); *United States* v. *Marquez*, 424 F.2d 236, 240 (C.A. 2), certiorari denied, 400 U.S. 828. Of course, the court must caution the jury that the indictment is not evidence. In this case, the court repeatedly so instructed the jury (Tr. 3502-3503, 3534), stressing that the indictment was merely a statement of the charges, and that the case was to be decided solely on the basis of the evidence presented in court.

Since this case involved numerous charges against nine defendants, the trial court determined quite reasonably that a copy of the indictment would help to insure that the jury would understand which counts were relevant to a particular defendant. This was plainly no abuse of discretion.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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